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Abraham Lincoln's Contemporaries

Charles P. Kirkland

Excerpts from newspapers and other sources

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Some Sober Second Thoughts about the New Constitutional History

In the days of Lincoln's Presidency, constitutional issues were paramount, rivalled only by the ultimate question of military success. Some of those same constitutional questions are still live ones in Lincoln literature. Others have been satisfactorily answered. Very few historians hold, for example, that Lincoln had any potential as a dictator, despite the Democrats' wartime assertions to the contrary. No dictator worth his salt would have missed the opportunity the war afforded to postpone the election of 1864. Other questions are very much alive. Whether Lincoln was willing to strain the Constitution only to save the Union but not for the sake of slaves is still a much-debated topic, as are other constitutional questions. Therefore, changing views of the role of the Constitution during the Civil War are of prime concern to all Lincoln students.

Recently, a group of scholars has begun to challenge the way of interpreting constitutional questions that most historians have used over the last forty years. Students of Lincoln are most familiar with the older approach as the one used by J. G. Randall, one of the greatest Lincoln scholars of all time. In discussing "The Rule of Law under Lincoln," Professor Randall urged: "Throughout our history it is necessary to look through the legal arguments of our leaders to the broad social purposes they have sought to attain. Constitutional history, in its ultimate significance thus becomes social history." Randall could use this insight of what was then called "The New History" in its most reductionist sense, as, for example, when he said of Lincoln's era that "Much of the constitutional reasoning of that time was what James Harvey Robinson has called mere 'rationalizing' — *'finding arguments for going on believing as we already do.'*" The natural result of such assumptions about constitutional debate was to ask how the war shaped the Constitution, that is, how what men wanted to believe in order to win the war altered what they had previously believed in peacetime.

The new constitutional history neatly reverses the assumptions of the old school. This is the way Harold Hyman, one of the major prophets of the new constitutional history, describes the new outlook:

> . . . inquirers have attended almost exclusively to only half the impact question, considering primarily the effects of the Civil War and Reconstruction on the Constitution. The other, largely ignored dimension of this question, perhaps more significant, asks: What were the Constitution's effects on the War and Reconstruction, on the nature of responses to felt wants by nation, state, and local governments, by individuals, by private associations, and by official institutions? If, as I now believe, ascertainable policy alternatives of the 1860's and 1870's were sharply limited as to number, kind, and duration by influential individuals' constitutional perceptions, then insight into those perceptions is in order. For the quarrels of a century ago not only shaped the Constitution, the Constitution shaped the quarrels.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Francis Lieber (1800-1872) was the author of the first systematic works on political institutions published in America. During the Civil War he acted as a consultant for the War Department. He wrote *Guerilla Parties Considered with Reference to the Laws and Usages of War* **(1862) and** *A Code for the Government of Armies* **(1863), which became the official manual of military law for the Civil War armies as** *General Orders No. 100.*

Professor Hyman's student, Phillip S. Paludan, learned his lessons well, and in his recent book, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era*, he apologizes that "There is no profound originality in my conclusion that constitutional ideas and preconceptions limited and perhaps destroyed the possibilities for permanent equal justice which the Civil War and Reconstruction spawned." He completely rejects the assumptions of Randall's era.

> . . . I have had to consider the possibility

that constitutional arguments are simply excuses or rationalizations for not acting to protect the Negro. I have rejected such an idea because it rings too much of the twentieth century, rather than the nineteenth. The rationalization of one era may well be the reality of another. . . . When it is asserted that someone is making excuses or rationalizing, what may be meant is that he is not giving the reason *we* would give for *our* behavior. This is hardly the best foundation for beginning historical study.

Starting from Hyman's premises, Paludan is less optimistic about what Hyman calls the adequacy of the Constitution, and he justifies his study on this ground: "The influence of racial attitudes and political necessities on the failure of Reconstruction is a subject of much current study, but the ability of legal and constitutional beliefs to cripple the era's civil rights advances has not been widely investigated."

The new constitutional history is obviously on to something, as the expression goes. It refuses to ignore a great volume of Civil War literature — pamphlets, speeches, platforms — that by other assumptions constitute merely a veil to be pierced in search of true feelings and desires. The new constitutional historians are certainly right to explore the ways in which genuine constitutional scruples shaped the policy alternatives available in the 1860s and 1870s. They have been particularly effective in showing that these scruples kept concerned policy makers from extending the role of the federal government in helping the freedmen during Reconstruction. States rights were not a casualty of the war. However, the new constitutional history is not altogether satisfactory and presents at least three problems that need to be dealt with. First, although it certainly provides a useful insight into the period, the new constitutional history as written thus far has been poorly served by some of its examples. That is to say, some of the particular constitutional thinkers that have been studied in depth seem to prove quite the opposite point from the one the new constitutional history seeks to prove. Second, the new school of thought has been able to state its insight so succinctly that it has the air of definitiveness about it. As a result, there is some feeling that the new constitutional history has exhausted the subject. In fact, its principal service has been to reopen the subject. Third, much of the new school of thought has been aimed at understanding the period of Reconstruction. Much of the new literature does deal with the Civil War but only insofar as it points towards the problems of Reconstruction. This seems to slight some aspects of Civil War constitutional debate. The problem can be explored in more detail by looking at the examples provided by the work of Hyman and Paludan.

The first problem is best exemplified in the work of Phillip Paludan, who explains his historical method this way:

The inquiry poses a problem in method; two options suggest themselves. The first is to read all the available speeches, pamphlets, and books on constitutional and legal topics and to synthesize from them a composite legal mind of the Civil War era. . . . But this method has its pitfalls. It frequently reveals as much about the mind of the historian as about the mind of the era. The process of selection and synthesis offers too many opportunities for culling from a body of thought only those comments that conform to the historian's generalization.

In addition I think this method is insufficiently historical. While it may tell what happened, it does not tell it the way it happened. Certainly the thought of an era exists, but it does not come into being as "the thought of an era." It is created in the minds of individual men who think of themselves, not as having "the mind of their era," but as unique human beings reaching conclusions based on personal experience and dictated by previous conclusions.

These difficulties are most easily avoided by the more modest method used here: to take what appear to be representative thinkers of an era and analyze their thought in relation to their time. The result, of course, is a narrower focus. Conclusions about the nature of thought during the period must be drawn more tentatively. But the method's merit is that it respects the reality of an enormously complex past. It recognizes that the thought of an age is a composite, not a homogenization of the thoughts of individuals.

This is a superior method, but to present any kind of convincing proof at all it must find unambiguous examples — unless the point to be proved is the ambiguity of the age.

Ambiguity is not the point of the new constitutional history; it does seek to prove that constitutional views shaped critical events. Unfortunately, Paludan is not always well served by the examples he chooses. In a book which examines five particular thinkers by way of proving that the Constitution shaped the war and Reconstruction, it seems strange that one of the thinkers would be Francis Lieber. Though certainly an influential thinker during the Civil War (he had Charles Sumner's ear, for example), Lieber always thought historically stable *in*stitutions much more important than *con*stitutions. Paludan admits the embarrassing fact that "Unlike any of the other subjects of this study, Lieber reacted to the legal questions of the Civil War by rejecting the Constituion as a guide: 'The whole rebellion is beyond the Constitution. The Constitution was not made for such a state of things.'"

Joel Parker, the Harvard Law School professor, presents an equally unsatisfactory case. To be sure, he was constitutionally much more conservative than Francis Lieber, and he argued vehemently for constitutional restraints on the war powers of the President. But, as Paludan points out, after an initial period of support, "Lincoln lost Parker's support after the fall of 1862." Such an observation does not advance our understanding of the importance of constitutional issues in Lincoln's administration. It only repeats one fundamental problem: if the Emancipation Proclamation (announced in the fall of 1862) was going too far but the Presidential suspension of the writ of *habeas corpus* was not, was constitutionalism or hatred of the black man the most important factor?

In the eccentric Philadelphian, Sidney George Fisher, Paludan has an even less fortunate example. Far and away the most innovative constitutional thinker of the Civil War, Fisher had a freewheeling intellect untrammelled by any of the traditional restraints of constitutional logic or tradition. The Civil War led him to advocate *congressional* abolition of slavery and changing the United States government to a parliamentary system on the British model. Nothing in the United States Constitution shaped these views; the British parliamentary system is what it is precisely because there is no written constitution to limit the legislature's will!

The other two figures in the book wrote principally on Reconstruction; indeed, one of them, Thomas M. Cooley, was only nineteen years old when the Civil War ended.

One could say that Professor Paludan chose the men he studies bravely, for the book devotes four of its eleven chapters to men, Lieber and Fisher, who thought the Constitution either irrelevant to the war effort or totally inadequate to the crisis — indeed, to men who were willing to do away with the Constitution either temporarily or forever. The Constitution did not shape Lieber's and Fisher's war. Joel Parker's constitutionalism carried him only part of the way in support of President Lincoln; he balked at the Emancipation Proclamation. That it was the race question which halted Parker's inclination towards broad construction of the President's constitutional war powers could as easily prove that the war shaped his constitutional views as *vice versa*.

The second major problem with the new constitutional history can best be seen in Harold Hyman's *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*. A large book in a prestigious series by an acknowledged authority in the particular field of Civil War constitutional history, this book may serve to frighten other students and scholars away from the subject. It should not.

A check of the footnotes does reveal that Professor Hyman did his homework. Excluding the common pamphlets by constitutional giants like Francis Lieber, the footnotes contain citations to at least forty-seven original articles and pamphlets on constitutional questions of the war itself, not counting sources for Reconstruction after the war or other constitutional issues during the period. As impressive as these citations are, they hardly exhaust the field. For example, Jay Monaghan's famous *Lincoln Bibliography, 1839-1939* lists at least fourteen pamphlets on constitutional questions which are not cited in *A More Perfect Union*. By looking at two examples of the rich constitutional literature of President Lincoln's day, one can get a feel for the work that remains to be done despite the splendid spadework of Professor Hyman and his students.

An interesting example of what can still be examined is Charles P. Kirkland's *A Letter to the Hon Benjamin R. Curtis, Late Judge of the Supreme Court of the United States, in Re-*

view of His Recently Published Pamphlet on the "Emancipation Proclamation" of the President (New York: Latimer Bros. & Seymour, Law Stationers, 1862), listed in Monaghan's *Bibliography* as item number 136. Judge Curtis of Massachusetts, though he had dissented from the Dred Scott decision, attacked the Emancipation Proclamation as an abuse of Presidential power. Kirkland, a New York lawyer, replied that the Proclamation would have been an abuse of executive power, which "manifestly and from the whole context of the Constitution, has reference to the civil power of the President . . . in time of *peace.*" But the Proclamation stemmed from other powers "which pertain to him *in time of war* as 'Commander-in-Chief.'" These powers, he added, "are provided for by the letter and by the spirit of other provisions of the Constitution, by the very nature and necessity of the case, by the first law of nature and of nations, the *law of self-preservation.*"

Kirkland was able to muster two telling points. First, as a good lawyer, he found a previous Supreme Court decision which was embarrassing to Curtis:

> The same argument which you make against presidential power was made in Cross v. Harrison, 16 Howard, 164, in the Supreme Court of the United States, in a case occurring during, and arising out of, our war with Mexico, in the judgment in which case you, as one of the Justices of that Court, concurred. In that case the President, without any specific provision in the Constitution — without any law of Congress pre-existing or adopted for the occasion, created a civil government in California, established a war tariff, and (by his agents) collected duties. The Court held that . . . "those acts of the President were the exercise of a *belligerent right;* that they were according to the *law of arms* and right on the *general principles of war* and peace." Who will allege, that the acts of the President on that occasion were not, to say the least, as unauthorized by the Constitution and the law as his proclamation in the present case?

Curtis had not denied in his attack on Lincoln that there was a state of war; he had only denied that the powers of the Commander-in-Chief extended to such things as emancipation. Kirkland did find an apparent inconsistency.

Kirkland also found a precedent of sorts. It was not a decided case but the opinion of a former President, John Quincy Adams. In the House of Representatives in 1842, Adams had declared, "that the military authority [in a state of *actual war*] takes for the time the place of all municipal institutions, slavery among the rest, and that under *that* state of things, so far from its being true that the States, where slavery exists, have the exclusive management of the subject, not only the President of the United States, but the (subordinate) commander of the army has *the power to order the emancipation of the slaves.*"

Kirkland's pamphlet, with its reference to John Quincy Adams, is significant for two reasons. First, President Lincoln himself read and liked Kirkland's pamphlet. On December 7, 1862, the President wrote Kirkland: "I have just received, and hastily read your published letter to the Hon. Benjamin R. Curtis. Under the circumstances I may not be the most competent judge, but it appears to me to be a paper of great ability, and for the country's sake, more than my own, I thank you for it." Second, David Donald, in his famous essay "Abraham Lincoln: Whig in the White House," argues that Adams's view of emancipation as a war power was an important aspect of Lincoln's Whig background, but he does not cite Kirkland's pamphlet. The closest link Donald can find between Lincoln's views and Adams's argument is Lincoln's endorsement of William Whiting's *War Powers of the President,* which "leaned heavily upon Adams's argument." In Lincoln's endorsement of Kirkland's pamphlet, there is further proof that the Adams connection was an important one for the Emancipator.

Another fascinating example of unexplored constitutional literature is W.W. Handlin's *American Politics, A Moral and Political Work, Treating of the Causes of the Civil War, the Nature of Government, and the Necessity for Reform* (New Orleans: Isaac T. Hinton, 1864). This eccentric work, referred to in Hyman's book in a vague note about "utopian and antiutopian literature," makes Sidney George Fisher's admiration of parliamentary government seem mild by comparison. Handlin despised universal suffrage and the political system built on it. He claimed that the Civil War itself was caused by political demagogues, originally men with no employment who gained a living by keeping the political cauldron boiling. He wanted to see electioneering "discountenanced," elective terms longer, judges appointed and not elected, and politics in general returned to the hands of the old and respectable rather than the young and idle men. Demagogues so flattered the people that the people came to think of themselves as potentates; they came to distrust government because of the pernicious idea that governors are servants. "It is natural for men to follow leaders," Handlin asserted, and leaders should have authority and respect.

Handlin was Whiggish in his views. He claimed, curiously, that there would have been no war if there had been a national bank. He supported a protective tariff, he supported colonization and the amelioration of the lot of the slave, and he opposed territorial expansion. He was, although Whigs certainly had no special claim to it, a staunch unionist as well. He valued the Union much more highly than the Constitution:

> But what is the Constitution? It is the fundamental law of the nation. It is not the nation. The nation may exist without it, as many nations do exist without formal or written constitutions. A part of the Constitution is the oath of the President, by which he undertakes to preserve, perpetuate and defend the nation. Everything which is necessary to that end should be done by him. If a case should arise where it would be necessary to go counter to the Constitution to save the nation, he should not hesitate to do it, because it would be his sworn duty; and it would be stupid to say that the government should be lost merely on account of some defective clause in the organic law.

Handlin was less interested in defending the administration's constitutionally questionable acts than he was in solving the problem which had brought on the war in the first place, demagogic politics. Arguing that the excitement caused by Presidential elections "will always cause war," Handlin urged that the President should be chosen by rotation. He recommended that the oldest Senator should become President for life. There was "nothing here . . . favoring . . . monarchy or empire," he said, and the age of the President would be no problem. Many Senators were "vigorous in intellect up to the moment of death." The men he had in mind were "Webster, Crittenden, Clay . . . , and in the last years of their lives they would have filled the office of President with power and credit." The examples were Whigs to a man, of course, and it should be noted that he failed to mention another of the great old Senators of that by-gone era, John C. Calhoun.

The existence of one more isolated thinker like Handlin whose thought on the Civil War overflowed any constitutional channels, does not challenge the essential insight of the new consitutional history in any major way. However, it does suggest that a too-willing acceptance of their insights will diminish any appreciation for the varieties of responses the Civil War evoked.

War and revolution are surely the events which are most capable of provoking innovative political ideas. In focusing on both the Civil War and Reconstruction — and the new constitutional historians tend to look at the two as one critical period in American history — some historians may be slighting the degree to which war shaped the Constitution. *Inter arma silent leges* is hoary doctrine, though it is not American doctrine, and it seems plausible that constitutional restraint may have been relatively greater in peace (Reconstruction) than in war. By not focusing on constitutional issues during the war exclusively, the new constitutional historians may tend to exaggerate the ability of constitutional ideas to restrain social action. The constitutional issues of the war years alone are surely complex enough for a book on the subject which does not look beyond 1865.

These observations, if they mean anything, are meaningful principally for the future study of this subject. The new work that has been done is good. The thinkers in Paludan's study are thoroughly treated. Hyman's work provides an interesting framework, grounded in a wide reading of the sources, for future investigations. Students of Lincoln's Presidency are indeed lucky to have such refreshing insights brought to their subject, but there is still room for much more work. Scholars should begin to explore the numerous pamphlets on constitutional issues; the new constitutional history has proved that this literature is more than "mere" rhetoric.